

**UNITED STATES DISTRICT COURT FOR THE  
WESTERN DISTRICT OF MISSOURI  
CENTRAL DIVISION**

|                             |   |                            |
|-----------------------------|---|----------------------------|
| Randall Lee DALTON, et al., | ) |                            |
|                             | ) |                            |
| Plaintiffs,                 | ) |                            |
|                             | ) |                            |
| v.                          | ) | Case No. 17-04057-CV-C-NKL |
|                             | ) |                            |
| Michael BARRETT, et al.,    | ) |                            |
|                             | ) |                            |
| Defendants.                 | ) |                            |

**JOINT MOTION FOR ENTRY OF CONSENT JUDGMENT**

Come now Plaintiffs and Defendants and jointly move this Court for entry of consent judgment. A copy of the proposed consent judgment is attached hereto and incorporated herein by reference.

Respectfully submitted,

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***Attorney for Defendants***

**CERTIFICATE OF SERVICE**

I certify that a copy of the foregoing was served upon counsel for each party by operation of this Court's ECF/CM system on May 13, 2019.

/s/ Anthony E. Rothert

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF MISSOURI  
CENTRAL DIVISION

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| v.                          | ) | Case No. 17-04057-CV-C-NKL |
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| Michael BARRETT, et al.,    | ) |                            |
|                             | ) |                            |
| Defendants.                 | ) |                            |

**[PROPOSED] CONSENT JUDGMENT**

**I. BACKGROUND**

- a. On March 9, 2017, Plaintiffs filed this class action petition for injunctive and declaratory relief in the Circuit Court of Cole County, State of Missouri, on behalf of themselves and all those similarly situated across the state, against the Missouri State Public Defender (MSPD), then-Governor Eric Greitens, and the State of Missouri (Defendants). Specifically, Plaintiffs, all indigent defendants with pending criminal cases at the time of filing, alleged multiple and longstanding systemic deficiencies in the delivery of indigent defense services by the Defendants, placing them, and all indigent defendants across the state, at a substantial risk of receiving constitutionally-defective representation at critical stages of their prosecution, in violation of their Sixth Amendment right to effective counsel and Article 1, Section 18(a) of the Missouri Constitution.
- b. On April 7, 2017, Defendants State of Missouri and then-Governor Eric Greitens removed the case to the U.S. District Court, Western District of Missouri, with the consent of the MSPD.

- c. On July 24, 2017, this Court denied the motion to dismiss filed by Defendants State of Missouri and Governor Greitens, and allowed Plaintiffs to move forward with their claims of actual and constructive denial of counsel on a system-wide basis. Defendants State of Missouri and Governor Greitens subsequently appealed the district court's decision on the motion to dismiss, arguing sovereign and legislative immunity.
- d. On January 10, 2019, the Eighth Circuit Court of Appeals reversed the trial court's motion to dismiss order and dismissed Defendants State of Missouri and Governor Greitens from the case, leaving MSPD Director Barrett and MSPD Commissioners Bock, Jackson, Chval, and Hogan as the remaining defendants.
- e. On February 26, 2019, this Court denied Plaintiffs' motion for class certification and, soon thereafter, ordered the parties to enter mediation in advance of trial.
- f. Following court-ordered mediation, Plaintiffs and the MSPD have agreed on the following terms in this Consent Judgment in order to resolve this case short of trial and to ensure that MSPD's prospective representation of indigent clients is both effective and in compliance with all relevant professional and ethical standards at every critical stage of each client's case. The Parties agree that such effective representation shall include: timely and frequent client communication; meaningful representation of indigent defendants at initial appearances, bail and bail reduction hearings, and preliminary hearings; timely review of discovery; sufficient case investigation in order to determine the relative strengths and weaknesses of the state's case; retention of qualified experts whenever necessary to provide effective representation; robust pre-trial motion practice; timely and

thorough preparation for trial; timely and thorough preparation for sentencing;  
and competent direct appeal advocacy.

## **II. Findings of Fact**

- a. The Court has subject-matter jurisdiction over this action pursuant to 28 U.S.C. § 1441(a), and venue is proper under 28 U.S.C. § 1391(b)(1).
- b. Plaintiffs are criminal defendants adjudged to be indigent under the standards set by Missouri law. *See* Mo. Rev. Stat. §§ 600.017(10), 600.086, 600.090; 18 C.S.R. § 10-3.010.
- c. Defendants are the Director and Commissioners of the Missouri State Public Defender System, which provides direct representation to indigent defendants in Missouri pursuant to Chapter 600.
- d. Plaintiffs and Defendants (the Parties) have determined that this Agreement is the most effective and prudent means to resolve the disputed issues underlying this action, rather than to engage in trial and appeal, which have the potential to be both long and costly, particularly in light of the extensive and uncontroverted record in this case regarding MSPD's excessive attorney caseloads and woefully inadequate resources, as well as the urgency surrounding the need to reach a resolution for the thousands of indigent defendants who continue to be harmed by the status quo.
- e. Indeed, since its establishment, MSPD has been evaluated at least 10 times by various outside groups.<sup>1</sup> All ten evaluations have reached a similar conclusion:

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<sup>1</sup> These include assessments conducted in 1993 (The Spangenberg Group); 2005 (The Spangenberg Group); 2006 (Interim Committee of the Missouri Senate); 2009 (The Spangenberg Group); 2010 (U.S. Department of Justice – Bureau of Justice Assistance); 2010 (American Bar Association); 2013 (National Juvenile Defender Center); 2014 (ABA-RubinBrown); 2016 (U.S. Department of Justice); and 2016 (Sixth Amendment Center).

that MSPD's excessive caseload calls into serious doubt whether clients receive constitutionally required and effective representation.

- f. And, in the time since the last of these reports, the situation has only worsened. From Fiscal Year 2015 to Fiscal Year 2017, MSPD's caseload increased more than 16%.
- g. Uncontroverted evidence presented in this case shows that, in Missouri, indigent defendants often appear in court without counsel during critical early stages of their case, including at initial appearance, where bail is typically set.
- h. Uncontroverted evidence presented in this case shows that, in Missouri, indigent defendants are routinely deprived of the basic functions of legal representation, including: regular communication; investigation of potentially available defenses; timely pre-trial discovery; legal research and motions practice; preparation for plea negotiations and counseling; key preliminary hearings; and trial.
- i. Indeed, in Fiscal Year 2018, a deposition was taken in no more than 3% of MSPD cases; investigations were conducted in no more than 22% of MSPD's cases; and, in cases that could have gone to a jury trial,<sup>2</sup> less than one percent of (.75%) MSPD's clients received a jury trial.
- j. Uncontroverted evidence presented in this case shows that, as a result of the deficiencies in their legal representation, indigent defendants in Missouri routinely face prejudice in their cases, including: unknowing or inadvertent waiver of defenses; waiver of meaningful due process requirements such as preliminary hearings or bond hearings; loss of exculpatory evidence over time;

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<sup>2</sup> A number of cases handled by MSPD's trial division are not eligible for a jury trial, to include mental health release petition cases, juvenile cases, and probation revocation cases.

repeated continuances that subject defendants to prolonged detention or court supervision; and insufficient adversarial testing of the strength of the prosecution's evidence.

- k. For example, Plaintiff Viola Bowman is an indigent defendant charged with first-degree murder and armed criminal action. On January 6, 2015, she appeared without counsel at her first arraignment, where her bail was set at \$1,000,000, which is what it remains. She was later assigned an MSPD attorney, who has requested continuances on more than 30 occasions, including multiple continuances of Bowman's trial. Trial is now set for August 2019, some four-and-a-half years after she first entered custody. In total, Bowman has been in pre-trial detention for more than 1,500 days. In his most recent continuance motion, her attorney stated that, in addition to his managerial responsibilities as District Defender of a district serving three counties, he was personally providing representation on 228 open and 61 inactive files, including Bowman's first-degree murder charge.
- l. These deficiencies also appear with respect to MSPD's representation of juvenile respondents in criminal and juvenile proceedings. As recently as 2013, the National Juvenile Defender Center (NJDC) deployed dozens of experts in Missouri to study its juvenile court system and assess the extent and quality of representation being provided to children in the State. The NJDC Report concluded that, after "endur[ing] at least two decades of crushing caseloads and inadequate resources to provide its mandated services," Missouri's juvenile indigent defense system is "broken" and is improperly "forced to ration services."

Moreover, uncontroverted evidence presented in this case indicates that, like their adult counterparts, juveniles accused of crimes in Missouri often go unrepresented at critical stages of their cases. The NJDC report concluded that nearly 60 percent of court-involved children in Missouri go without a public defender entirely.

Indeed, MSPD's Director of Juvenile Defense and Policy testified that she did not disagree with any of NJDC's findings.

- m. Because MSPD views itself as being constrained on the one hand by its workloads and bound on the other hand by ethical requirements proscribed by the Rules of Professional Conduct, MSPD has placed thousands of indigent defendants on waitlists over the last year and a half. As of this writing, some 4,316 indigent defendants are on waitlists in Missouri, many of whom remain in pre-trial detention. During their time on a waitlist, indigent defendants have no access to legal representation whatsoever.
- n. While MSPD does not admit that the constitutional rights of any specific indigent defendant or defendants, including Plaintiffs, have been violated, the Parties agree that the evidence in this case shows that MSPD attorneys devote, on average, just 21% of the time that prevailing professional norms suggest is adequate for the kind of offense for which they were undertaking representation.<sup>3</sup>

### **III. Conclusions of Law**

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<sup>3</sup> At the request of the ABA, RubinBrown researchers reviewed MSPD data and calculated the average number of hours (excluding court time, travel, and related administrative tasks) that an attorney would need to devote to a range of different types of cases in order to provide constitutionally adequate representation. The study determined that a constitutionally adequate attorney would spend an average of 106.6 hours on non-capital murder/homicide; 47.6 hours on A/B felonies; 25.0 hours on C/D felonies; 63.8 hours on sex felonies; 11.7 hours on misdemeanors; 9.8 hours on probation violations; and 19.5 hours on each juvenile case.



- a. The right to counsel in criminal cases is protected by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, and Article I, Section 18 of the Missouri Constitution. *See, e.g., Rothgery v. Gillespie Cty.*, 554 U.S. 191, 217 (2008); *United States v. Wade*, 388 U.S. 218, 228 (1967); *State ex rel. Mo. Pub. Def. Comm'n v. Pratte*, 298 S.W.3d 870, 874-75 & n.4 (Mo. banc 2009).
- b. The federal and state constitutions require the State to provide counsel to criminal defendants who are unable to afford their own legal representation. *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Pratte*, 298 S.W.3d at 874-75 & n.4; *see also Geders v. United States*, 425 U.S. 80, 88–91 (1976) (holding that a criminal defendant has a constitutional right to consult with his appointed counsel).
- c. The federal Constitution also requires that States provide meaningful representation to indigent juveniles facing delinquency proceedings. *In re Gault*, 387 U.S. 1, 36 (1967).
- d. Counsel must provide at least minimally adequate representation in order to meet federal constitutional standards. *See United States v. Cronin*, 466 U.S. 648, 653 (1984); *see also Strickland v. Washington*, 466 U.S. 668 (1984).
- e. The right to counsel may be conceived of as both prospective—i.e. applying from the outset of the criminal proceeding—and retroactive, i.e. permitting a guilty verdict or plea to be set aside if an individual defendant proves that the absence of competent counsel affected her criminal proceeding. *See Rothgery v. Gillespie Cty.*, 554 U.S. 191, 217 (2008); *see also State ex rel. Missouri Pub. Def. Comm'n v. Waters*, 370 S.W.3d 592, 597 (Mo. banc. 2012).

- f. Proof that systemic inadequacies in a State's public defense system have routinely resulted in actual or constructive denials of counsel at critical stages of prosecution will support a claim for prospective relief under the Sixth Amendment. *See Cronin*, 466 U.S. at 653; *Tucker v. State*, 394 P.3d 54, 62 (Idaho 2017); *Waters*, 370 S.W.3d at 608; *Kuren v. Luzerne Cty.*, 146 A.3d 715, 718 (Pa. 2016).
- g. The routine absence of "traditional markers of legal representation" from a state public defense system—namely, counsel's frequent nonattendance during critical stages of the criminal proceedings; minimally adequate communication with clients; and/or failure to conduct sufficient investigation<sup>4</sup>—will demonstrate that a State's public defense system is constitutionally inadequate. *See Geders v. United States*, 425 U.S. 80, 88–91 (1976); *see also Wilbur v. City of Mount Vernon*, 989 F. Supp. 2d 1122, 1137 (W.D. Wash. 2013); *Avery v. Alabama*, 308 U.S. 444, 446 (1940); *Pub. Defender v. State*, 115 So. 3d 261 (Fla. 2013); *State v. Citizen*, 898 So. 2d 325 (La. 2005); *State v. Peart*, 621 So. 2d 780 (La. 1993).
- h. When systemically deficient counsel routinely results in the multiplication of the collateral consequences that attend the pendency of a criminal case; prolongs the loss of liberty in the form of pre-trial detention; and substantially impairs indigent defendants' ability to compete on an equal footing within the criminal-justice system, there is actual prejudice. *See* ECF No. 69 at 36–37 (citing *Barker v.*

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<sup>4</sup> The U.S. Department of Justice has identified and articulated the "traditional markers of legal representation" in various amicus briefs and statements of interest filed in other public defense reform cases across the country. *See, e.g., Hurrell-Harring, et al. v. State of New York, et al.*, Index No. 8866-07, Doc. No. 11697717 at 12-14 (N.Y. Sup. Ct. 2014), Statement of Interest of the United States; *Kuren, et al. v. Luzerne County, et al.*, 2015 WL 10768531 at 11-13 (Pa. 2016), Brief of the United States as *Amicus Curiae* in Support of Appellants; *Tucker, et al. v. State of Idaho, et al.*, No. 43922-2016, Brief for the United States as *Amicus Curiae* Supporting Plaintiffs-Appellants at 25-28.

*Wingo*, 407 U.S. 514, 532–33 (1972); *Ne. Fla. Chapter of Associated Gen.*

*Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 666 (1993).

- i. The constitutional guarantee of the assistance of counsel is a guarantee of “untrammelled and unimpaired” loyalty; representation by an attorney “struggl[ing] to serve two masters” amounts to a denial of counsel for purposes of the Sixth Amendment. *Glasser v. United States*, 315 U.S. 60, 70, 75 (1942). In other words, an attorney forced to choose between the interests of two clients—co-defendants with conflicting defenses, for instance, or a current and a former client—is hopelessly compromised as far as the Constitution is concerned. A defendant need not show prejudice if his attorney is laboring under a conflict of interest. *Holloway v. Arkansas*, 435 U.S. 475, 484 (1978). Where an attorney is unable to provide constitutionally adequate representation to all her clients, her clients’ interests are in opposition with one another: doing the constitutional minimum for one defendant necessarily takes time that could be spent providing the constitutional minimum to another. *See Public Defender, Eleventh Judicial Circuit of Fla. v. State*, 115 So. 3d 261, 267 (Fla. 2013); *People v. Roberts*, 321 P.3d 581, 589 (Colo. App. 2013); *State ex rel. Mo. Pub. Def. Comm’n v. Waters*, 370 S.W. 3d 592, 609 (Mo. banc 2012); *In re Edward S.*, 92 Cal. Rptr. 3d 725, 746-47 (Cal. Ct. App. 2009); *United States ex rel. Green v. Washington*, 917 F. Supp. 1238, 1275 (N.D. Ill. 1996).
- j. Although MSPD denies that its attorneys aim to provide anything other than constitutionally-adequate representation, the Parties agree that, given the overwhelming admissible evidence that MSPD is grossly overburdened, and that

the burden under which it operates routinely and systematically harms indigent criminal defendants by depriving them of competent counsel, there is a high likelihood that Plaintiffs would be able to prove their constitutional claims against the MSPD.

**NOW, THEREFORE, IT IS HEREBY STIPULATED AND ORDERED** as follows:

**IV. PARTIES**

- a. Plaintiffs Viola Bowman, Brian Richman, Dorian Samuels, and Randall Lee Dalton (“Plaintiffs”).
- b. Defendants Michael Barrett, in his official capacity as Director of the Missouri State Public Defender Office, and Riley Bock, Charles R. Jackson, Craig Chval, and A. Crista Hogan, all in their official capacities as members of the Missouri State Public Defender Commission (collectively, “MSPD Defendants” or “MSPD”).

**V. DEFINITIONS**

- a. **Action** refers to this lawsuit, *Dalton, et al. v. Barrett, et al.*, filed by Plaintiffs on March 9, 2017, and originally captioned *Shondel Church, et al. v. State of Missouri, et al.*
- b. **Arraignment** refers to the proceeding at which a criminal defendant or juvenile respondent in Missouri is presented with the formal charges against them and is required to enter a plea.
- c. **Assigned caseload** means the number of new cases an individual public defender has been assigned by their attorney-manager over a specified time period.
- d. **Attorney-managers** are MSPD attorneys, including District Defenders, who are responsible for the supervision and evaluation of attorneys within a particular office, unit or division.
- e. **Caseload data** refers to information related to the assignment, management, and disposition of cases by MSPD attorneys, including but not limited to the number

of cases handled, the nature of those cases, and the amount of time spent on each case.

- f. **Caseload standard** refers to the MSPD's annual case assignment limit, as established under this Consent Judgment, which requires MSPD to ensure that, over the course of any given calendar month period, public defenders not be assigned more than 173.3 hours' worth of cases, based on the numbers established by the American Bar Association and the accounting firm RubinBrown as part of the 2014 Missouri Project, as articulated in Section XVIII(c) of this Consent Judgment.
- g. **Criminal justice stakeholders** include indigent defendants, public defenders, judges, prosecutors, probation officers, legislators, or other actors within, or with authority over, Missouri's criminal legal system.
- h. **Day** means a business day unless otherwise specifically noted.
- i. **Delphi methodology** is the process of congregating expert opinion through a series of iterative questionnaires, with a goal of coming to a group consensus. Several rounds of questionnaires are sent out to the group of experts, and the anonymous responses are aggregated and shared with the group after each round. The Delphi method was employed by the authors of the 2014 Missouri Project, which identified the average amount of time attorneys should spend on particular types of criminal cases in order to provide their clients with reasonably effective legal representation.
- j. **District Defender** is the supervising attorney in one of MSPD's district offices across the state.
- k. **Effective date** is the date on which this Consent Judgment is approved and signed by the Court.
- l. **Excessive workloads** are workloads that prevent public defenders from providing constitutionally-effective representation to each of their clients due primarily to the unreasonably high number of cases to which the attorneys are assigned.
- m. **Initial appearance** refers to the first proceeding at which a criminal defendant or juvenile respondent in Missouri appears before a court, and during which the court sets bail for defendants or respondents held in custody.
- n. **Monitor** refers to the person or entity selected by the Parties to ensure that the MSPD implements each of the provisions articulated in this Consent Judgment in a satisfactory and timely manner.
- o. **Parties** refers collectively to Plaintiffs Viola Bowman, Brian Richman, Dorian Samuels, and Randall Lee Dalton, and Defendants Michael Barrett, in his official

capacity as Director of the Missouri State Public Defender Office, and Riley Bock, Charles R. Jackson, Craig Chval, and A. Crista Hogan, all in their official capacities as members of the Missouri State Public Defender Commission.

- p. **Pending (open) caseload** means all cases to which a public defender is currently assigned which have not reached final disposition, such as dismissal, guilty plea, trial, or, in cases of direct appeal, issuance of the appellate mandate.
- q. **Preliminary hearing** is the proceeding at which the State must establish probable cause to believe that the defendant committed the crime(s) charged and that, therefore, the case should be allowed to move forward.
- r. **Public defenders** are MSPD attorneys who are responsible for representing indigent defendants in Missouri.
- s. **Substantial compliance** means that the MSPD has met, or is likely to meet, all or most of the requirements articulated in Sections VI through XVI, and XVIII through XIX(a) of this Consent Judgment, for a period of at least two consecutive years. The determination as to whether the MSPD has achieved substantial compliance shall be made by the Monitor. Either Party may appeal the Monitor's decision with respect to substantial compliance to this Court.

## VI. INITIAL APPEARANCES

- a. The MSPD shall ensure that all criminal defendants and juvenile respondents have immediate access to applications for public defender services by, among other things, ensuring that county jails are aware of and in compliance with all relevant laws and rules regarding the provision of such applications.
- b. The MSPD shall ensure that all criminal defendants and juvenile respondents are promptly screened for indigence in order to provide representation at such person's initial appearance.
- c. The MSPD shall strive to ensure that such prompt screening occurs within two days from receipt of a defendant's application for public defender services, unless further financial investigation is needed, in which case the prospective client shall be notified of the financial investigation within the same time period.

- d. The MSPD shall ensure that public defenders make all reasonable efforts to meet with the client, in a private and confidential space, prior to the initial appearance, and that in-court discussions with clients supplement, not supplant, such meetings.
- e. The MSPD shall ensure that public defenders make an argument for the client's release at the initial appearance and/or for a bail amount that the client can afford to pay.
- f. The MSPD shall ensure that public defenders advise all clients not to waive any substantive rights or plead guilty at the initial appearance.

#### **VII. BAIL ADVOCACY**

- a. The MSPD shall ensure that all public defenders receive training and are familiar with all relevant laws and rules concerning bail, including the legal factors that the court may and may not consider in setting bail amounts and what conditions of release may be imposed.
- b. In the event that the court declines to release the client pre-trial and/or the client is unable to post bail, MSPD shall ensure that public defenders promptly file a motion for a bail review hearing.
- c. The MSPD shall ensure that public defenders spend sufficient time meeting with clients prior to any bail hearing in order to ascertain sufficient information to advocate for the defendant's pre-trial release under conditions that are the least restrictive to the client. This should include gathering information regarding any potential evidence or witnesses that should be present at any such bail hearing to

demonstrate that the client is not a flight risk or a threat to public safety, in accordance with Missouri Supreme Court Rule 33.01.

- d. In the event that the court declines to reduce his or her bail to an amount that the client can afford, the MSPD shall ensure that all public defenders: inform clients of their right to review under Missouri Supreme Court Rules 33.05, 33.06, 33.09, and any other applicable Rules on bail review; advise clients on the considerations of seeking such review; and provide representation in such review.
- e. In the event that the client remains in pre-trial detention, MSPD shall ensure that the appointed public defender alerts the incarcerating authority and/or the court, concerning any special needs of the client, including but not limited to, any dietary restrictions, health-related matters, and religious or faith-based needs.
- f. The MSPD shall ensure that clients who are unable to make bail within 30 days of their first appearance are prioritized with motions for a speedy trial, unless there is good cause to refrain from so filing, in which case such cause should be documented in the client's file.

#### **VIII. CLIENT COMMUNICATION**

- a. In addition to any other communication requirements, the MSPD shall ensure that trial-level public defenders meet with each client within the first seven days following the assignment of the case, as well as every 30 days thereafter, unless there are no significant updates in the client's case.
- b. The MSPD shall ensure that public defenders answer all client correspondence (including electronic correspondence such as email or text) within 10 days of receipt and all phone messages from clients within two days of receipt.



- c. For any incarcerated clients, client meetings should occur in a private and confidential location at the jail. If there is no such space available, other locations such as an office or private room at the courthouse are acceptable alternatives, provided they are confidential and not part of a docket on which the client is appearing.
- d. The MSPD shall ensure that client meetings occur at least one day before scheduled court dates and may be supplemented, but not supplanted, by follow-up meetings on the day of the proceeding in question.
- e. The MSPD shall take appropriate legal steps to ensure that county jails and state prisons are in compliance with all laws and rules regarding access to counsel and the privacy of client communications.

#### **IX. PRELIMINARY HEARINGS**

- a. The MSPD shall ensure that public defenders promptly seek a preliminary hearing in each client's case, unless there are compelling, client-specific reasons to waive that right in that individual client's case.
- b. The MSPD shall ensure that, in advance of and in preparation for any preliminary hearing, the public defender meets with the client: to obtain all relevant information; to seek any available discovery from the prosecution; to conduct a preliminary investigation of the facts underlying the criminal charges, and to secure any helpful witnesses to counter testimony given by the prosecution's witnesses.

- c. The MSPD shall ensure that public defenders seek and obtain the written transcript of any preliminary hearing proceedings when necessary to prepare for trial, and that the transcript is shared with the client.
- d. The MSPD shall ensure that, during the course of the preliminary hearing, the public defender is prepared to examine and cross-examine relevant witnesses, and, whenever possible, to formulate an argument that the evidence presented by the prosecution fails to demonstrate the existence of probable cause as to at least one element of the crime charged.

**X. DISCOVERY**

- a. The MSPD shall ensure that all public defenders receive training and are familiar with the nature and scope of all laws and rules concerning discovery in criminal cases, including all information that is obtainable under law.
- b. The MSPD shall ensure that, in every case, public defenders file written requests for discovery pursuant to Missouri Supreme Court Rule 25.03(b) within two days of the filing of the information or indictment, and no later than 20 days following arraignment.
- c. In addition, the MSPD shall ensure that public defenders file a written request for discovery pursuant to Missouri Supreme Court Rule 25.03(a) in all felony cases within two days of the initial appearance.
- d. The MSPD shall ensure that, whenever appropriate, public defenders petition the court to order further discovery that is not covered by Missouri Supreme Court Rule 25.03, pursuant to Missouri Supreme Court Rule 25.04.

- e. In the event that discovery is not timely provided, the MSPD shall ensure that public defenders file a motion to compel discovery and seek whatever relief is appropriate for failure to provide timely discovery.
- f. The MSPD shall provide training to all public defenders on the proper pre-trial investigation of witnesses, including when it is necessary or appropriate to conduct interviews and/or depositions of adverse witnesses, including law enforcement officers.
- g. The MSPD shall ensure that the results of any pre-trial investigation, including any evidence gleaned from depositions, is obtained with sufficient time to communicate such results to the client, and so that such information may be adequately used at trial.

#### **XI. INVESTIGATION/EXPERT WITNESSES**

- a. The MSPD shall ensure that, in every case, public defenders promptly review all discovery information obtained in connection with the case and conduct whatever investigation is appropriate to allow for the fullest possible understanding of the facts, allegations, circumstances, and merits of the case, as well as the range of punishment that may be imposed in the event of a conviction.
- b. The MSPD shall ensure that public defenders request the assistance of an investigator if the same is necessary to secure all such relevant information.
- c. The MSPD shall ensure that, in every case, public defenders review all discovery information obtained in connection with the case within 30 days of receipt.

- d. The MSPD shall provide training to all public defenders on the proper use of experts in their cases, including when it is necessary or appropriate to retain an expert witness.
- e. If the public defender determines that an expert would be necessary or helpful to the client's case, the public defender shall promptly request the resources necessary to identify and retain the appropriate expert(s).
- f. The MSPD shall provide training to all public defenders on the proper use of mental health exams and shall ensure that public defenders seek mental health exams for clients when appropriate.
- g. The MSPD shall ensure that funds are distributed in a timely manner in order to secure the services of any expert(s) or mental health exam(s). In the event that no funds are available, the MSPD shall ensure that public defenders file appropriate motions seeking such funding pursuant to *Ake v. Oklahoma*, 470 U.S. 68 (1985).

## **XII. PRE-TRIAL MOTION PRACTICE**

- a. The MSPD shall ensure that public defenders receive sufficient training on pre-trial motion practice, including on local court rules governing the procedure and time limitations for filing and litigating pre-trial motions.
- b. The MSPD shall ensure that, only after conducting sufficient investigation and researching relevant law, public defenders file any motions they deem strategically and legally appropriate in each client's case, including but not limited to motions that address:
  - i. Bail reduction;
  - ii. Speedy trial;

- iii. Unreasonable searches and seizures;
  - iv. Illegally obtained statements from the defendant;
  - v. Suggestive identification procedures;
  - vi. Severance from or joinder with other defendant(s) or charges;
  - vii. Funds for experts, investigations, special procedures, etc.;
  - viii. Change of venue or judge;
  - ix. Unconstitutionality of the statute under which the client is charged;
  - x. Insufficiency of the charging document under which the client is charged;  
and
  - xi. Insufficiency of the evidence in a felony case, as presented to either the grand jury or circuit court, resulting in the filing of the indictment or information.
- c. The MSPD shall ensure that public defenders consider, and discuss with the client, any potential benefits the client may receive, as well as any potential adverse effects that the client might suffer, as a result of any pre-trial motions.
  - d. The MSPD shall ensure that public defenders also consider filing motions *in limine* to bring the trial court's attention to any problematic issues which might arise at trial.
  - e. The MSPD shall ensure that public defenders strive to review motion drafts with clients prior to filing, incorporate client feedback when helpful to the litigation and, if not helpful, explain to the client the reasons for excluding such feedback from the motion.
  - f. The MSPD shall ensure that public defenders mail or provide copies of all motions filed to the client within five days of filing the motion.

### **XIII. GUILTY PLEAS**

- a. The MSPD shall ensure that, before advising any client to plead guilty, public defenders request and review all discovery concerning the case, as well as any information acquired as part of a preliminary investigation, and conduct any further investigation, including the consulting and hiring of experts, if needed to determine potential defenses to the charge(s).
- b. The MSPD shall ensure that, before advising any client to plead guilty, public defenders share that information with the client and discuss the prospective strengths and weaknesses of the prosecution's case, including the availability of likely prosecution witnesses, the concessions and benefits that are subject to negotiation, and the possible consequences of a conviction.
- c. The MSPD shall ensure that public defenders do not advise a client to plead guilty merely because of the pre-trial incarceration of a client. In such cases, MSPD shall ensure that public defenders seek an immediate bail reduction hearing.
- d. The MSPD shall ensure that before a public defender advises any client to plead guilty, the complete circumstances of the case warrant such advice.
- e. The MSPD shall ensure that public defenders discuss with any client who is, or whom the public defender believes may be, a non-citizen, any potential immigration consequences to a guilty plea or conviction after trial. The MSPD shall ensure that all public defenders are familiar with the U.S. Supreme Court's decision in *Padilla v. Kentucky*, 559 U.S. 356 (2010), and the obligations of defense counsel in advising non-citizen clients, as articulated by the U.S. Supreme Court.

- f. The MSPD shall ensure that, notwithstanding the existence of ongoing plea negotiations, public defenders continue to prepare the case as if it was proceeding to trial.
- g. The MSPD shall ensure that prior to advising a client to accept any plea offer, the public defender must be satisfied that:
  - i. There is a substantial likelihood of conviction at trial, based on a thorough investigation, and that it is consistent with the client's goals and in the client's best interests to plead guilty under the circumstances;
  - ii. Any guilty plea is entered into voluntarily and intelligently, based on a thorough review of the facts and investigation, and that the client understands all aspects of the plea agreement, as well as all consequences of a guilty plea under the agreement;
  - iii. The client understands the rights that he/she is waiving, including: the right to a trial by jury; the right to assistance of counsel at trial; the right to compulsory process; the right to confront witnesses; the right to testify; the privilege against self-incrimination; and the state's burden of proof beyond a reasonable doubt; and
  - iv. The client understands the consequences of conviction, including: the maximum possible sentence faced; any mandatory minimum sentence; the potential liability for enhanced punishment; collateral consequences, such as having to register as a sex offender and potential exposure to civil commitment under the sexually violent predator law; probation and parole requirements; and potential civil liabilities arising out of conviction for the particular offense(s) in question.

#### XIV. TRIAL

- a. The MSPD shall ensure that public defenders invest the appropriate time and resources preparing for each client's trial. Such preparation shall include, at a minimum:
  - i. Using the facts and information developed through prior investigation of the case and/or initiating further investigation necessary to bolster the client's defense;

- ii. Subpoenaing witnesses favorable to the defense;
  - iii. Discussing with the client the right to remain silent and the right to testify, and, if he or she indicates a willingness to testify, preparing the client to testify;
  - iv. Developing case themes;
  - v. Obtaining coverage for the public defender's other appearances while trial is ongoing;
  - vi. Developing *voir dire* questions that are consistent with the public defender's theme or theory of the case; and
  - vii. Developing opening statements, direct and cross-examinations, closing arguments, and jury instructions that advance case themes.
- b. Any trial conducted by a public defender with fewer than five years of experience with MSPD shall be second-chaired by a more experienced MSPD attorney.

#### XV. SENTENCING

- a. The MSPD shall ensure that public defenders adequately prepare for each client's sentencing hearing. Such preparation shall include, at a minimum, a thorough understanding and consideration of:
- i. The range of punishment for each offense for which the client stands convicted, and the possibility of concurrent or consecutive sentencing;
  - ii. The collateral consequences of any possible sentence;
  - iii. The client's preferable sentencing outcome given the available options;
  - iv. The official version of the client's prior arrest and conviction history, if any;
  - v. Any letters or other correspondence from individuals or entities in support of a favorable sentence for the client;
  - vi. Any need for a pre-sentence mental examination and/or commitment to a mental hospital as an aid to sentencing;
  - vii. The typical sentencing practices of the sentencing judge;



- viii. The position of the probation department with respect to the client, together with any reports or recommendations to be submitted by that office, including the pre-sentence investigation report;
  - ix. The sentencing recommendation of the prosecutor;
  - x. The likely conditions of a possible probation, particularly as they relate to restitution or other fines and fees;
  - xi. Any alternative sentences that are available to the court; and
  - xii. Any other information, evidence, or proposal that may be helpful to the client.
- b. The MSPD shall ensure that, to the extent possible, public defenders take steps to advocate for a favorable sentencing recommendation for each client, including by calling relevant witnesses at the sentencing hearing in order to obtain a more favorable sentence.
- c. The MSPD shall ensure that public defenders consult with the client before any sentencing assessment report (SAR) is finalized and submitted to the court; and
- d. The MSPD shall ensure that, with regard to the SAR, public defenders carefully review the report with the client, challenge incorrect information or omissions, correct such mistakes, and consider submitting an independent sentencing memorandum on behalf of the client.

#### **XVI. DIRECT APPEAL**

- a. The MSPD shall ensure that appellate public defenders notify their client within seven days of being assigned to such client's case.
- b. In addition to the other communication requirements, the MSPD shall ensure that appellate public defenders keep the client timely informed of all developments in

their case, such as: record on appeal due dates; extension requests; brief due dates; oral argument dates; and post-opinion motions.

- c. The MSPD shall ensure that appellate public defenders mail copies of all records on appeal, extension requests, briefs, appellate opinions, and post-opinion motions, to clients within two days of filing.
- d. The MSPD shall ensure that appellate public defenders answer all client correspondence (including in electronic form such as email or text) within 10 days of receipt and all phone messages from clients within two days of receipt.
- e. Prior to filing an opening brief on appeal, the MSPD shall ensure that appellate public defenders have at least one in-person meeting with the client during which the public defender shall discuss potential issues to be raised on appeal. Although the public defender shall make the ultimate choice of issues to raise on appeal, the public defender shall consider and take into account the input of the client as to choice of issues, and shall seek to reach mutual agreement with the client as to issues to be raised.
- f. The MSPD shall ensure that appellate public defenders file a reply brief in a case whenever the merits of a case so require. There shall be a presumption that the merits of a case require a reply brief, unless the public defender can articulate a valid legal reason(s) to the contrary.
- g. The MSPD shall ensure that appellate public defenders seek oral argument in a case whenever the merits of the case so require. There shall be a presumption that the merits of a case require oral argument, unless the public defender can articulate a valid legal reason(s) to the contrary.

- h. The MSPD shall ensure that appellate public defenders notify clients of the appellate opinion in their case within two days of its filing by the appellate court. The appellate public defender shall also notify clients within the same two days whether the public defender will be filing post-opinion motions, such as motions for rehearing or transfer.
- i. Post-opinion motions shall be filed whenever the merits of a case so require. If the public defender informs a client that they will be filing post-opinion motions, the MSPD shall ensure that the appellate public defender timely files such motions.
- j. The MSPD shall ensure that appellate public defenders notify their clients within two days of the filing of the appellate opinion that the public defender will not be filing post-opinion motions, so that the clients may have time to pursue such motions on their own.
- k. The MSPD shall ensure that appellate public defenders notify clients of the denial of an intermediate appellate court's post-opinion motion within two days of the denial, and also notify clients within the same two days whether the appellate public defender will be filing an application for transfer with the Missouri Supreme Court.
- l. The MSPD shall ensure that appellate public defenders timely file an application for transfer whenever the merits of a case so require, and where the public defender has informed the client that they would file for transfer.
- m. The MSPD shall ensure that appellate public defenders notify their clients within two days of a denial of a post-opinion motion by an intermediate appellate court

that the public defender will not be filing an application for transfer so that clients may have time to pursue such an application on their own.

- n. The MSPD shall ensure that appellate public defenders file a petition for writ of certiorari with the United States Supreme Court whenever the merits of a case dictate that it would be appropriate to do so.

## **XVII. MONITOR**

- a. In order to facilitate the successful implementation of this Consent Judgment, the Court shall appoint a Monitor to assess, on an ongoing basis, the extent to which the MSPD complies with the terms of this Consent Judgment, and to advise the Court on any compliance issues that may arise. The Monitor's authority shall be limited to the duties expressly set forth in this Consent Judgment.
- b. Within seven days of the Effective Date of this Consent Judgment, the Parties shall identify and recommend potential monitors, on which the Parties mutually agree, to the Court for consideration. The Court shall make the final determination as to which of these proposed monitors will be appointed as Monitor for purposes of this Consent Judgment. Should the Monitor, or any successor, become unwilling or unable to serve as Monitor while this Consent Judgment is effective, then the Parties shall mutually agree upon two to four potential successors and recommend those individuals to the Court, which shall appoint a successor from among those recommended by the Parties. MSPD shall make all reasonable efforts to ensure that the fees and costs of the Monitor are paid in full, and in a timely manner.

## **XVIII. CASELOAD CAPACITY**

- a. The MSPD shall ensure that public defenders practice within the ethical guidelines set forth in the Rules of Professional Conduct, including taking affirmative steps to avoid concurrent conflicts of interest under Missouri Supreme Court Rule 4-1.7. *State ex rel. Mo. Pub. Def. Comm'n v. Waters*, 370 S.W. 3d 592, 607-608 (Mo. banc 2012).<sup>5</sup>
- b. The MSPD shall ensure that, in order to fulfill the requirements contained herein, public defenders are not assigned or do not accept more clients and cases than they can effectively and ethically represent.
- c. In order to establish thresholds for representation, MSPD became the first public defender system in the nation to subject itself to a rigorous audit. Toward this end, the American Bar Association (ABA) enlisted the services of the accounting firm RubinBrown, which used the Delphi methodology to estimate the average time required, as it relates to controllable case tasks,<sup>6</sup> for an attorney to provide reasonably effective representation for each case type. *See attached The Missouri Project: A Study of the Missouri Defender System and Attorney Workload Standards*, Am. Bar Ass'n Standing Comm. on Legal Aid & Indigent Defendants, 2014 (hereafter "RubinBrown workload averages").<sup>7</sup>

<sup>5</sup> "[A] lawyer shall not represent a client if the representation involves a concurrent conflict of interest," which exists if "there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client." Rule 4-1.7(a)(2)." "[A] conflict of interest is inevitably created when a public defender is compelled by his or her excessive caseload to choose between the rights of the various indigent defendants he or she is representing."

<sup>6</sup> Uncontrollable case tasks include such things as time spent appearing in court, necessary case travel, as well as various public defender training and administrative requirements. Such tasks are often dictated by the court's schedule and the area covered by the public defender area office.

<sup>7</sup> The Missouri Project has prompted several other states to engage in the same type of rigorous review, also using the Delphi methodology. Several of these states have since factored in additional "Controllable Case Tasks" (e.g., attorney training and administrative time), which has increased the amount of hours-per-case for each case type. Also, The Missouri Project does not account for attorney experience. Because Missouri's numbers do not include several of these factors, the hours-per-case in the chart above actually undercount the number of actual hours required for each case type.

- d. The RubinBrown workload averages are as follows:

| Case Type           | Controllable Case Task<br>Hours per Case |
|---------------------|--|
| Murder / Homicide   | 106.6                                    |
| A/B Felony          | 47.6                                     |
| C/D Felony          | 25.0                                     |
| Sex Felony          | 63.8                                     |
| Misdemeanor         | 11.7                                     |
| Juvenile            | 19.5                                     |
| Appellate / PCR     | 96.5                                     |
| Probation Violation | 9.8                                      |

- e. Unless otherwise provided herein, the MSPD shall ensure that public defenders not exceed the MSPD caseload standard, as defined in Section V above.
- f. The first component of the caseload standard is the number of available work hours in a given year, which, under this Consent Judgment, shall equal 40 hours a week, 52 weeks a year, with no time allotted for vacation or sick time, no time allotted for training or administrative functions, and no holidays. This equates to 2,080 hours of available work time over the course of a year.
- g. The second component of the caseload standard entails calculating the number of cases an attorney is assigned over a given period, i.e., "assigned caseload," using the RubinBrown workload averages described above as the benchmark.
- h. The MSPD caseload standard will limit case assignments to no more than 2,080 hours' worth of case work each year. This means that, for each calendar month period, MSPD shall ensure that public defenders not be assigned more than 173.3 hours' worth of case work.
- i. Unless otherwise provided herein, and notwithstanding any provision of law to the contrary, no public defender shall be assigned a number of cases in excess of the MSPD caseload standard, according to the RubinBrown workload averages.

- j. The MSPD shall ensure that attorney-managers maintain an accurate record to ensure that each public defender's assigned caseload does not exceed the MSPD caseload standard.
- k. Unless otherwise provided herein, if accepting an additional case would mean requiring any public defender's assigned caseload to exceed the MSPD caseload standard, the MSPD office in question shall not accept any additional cases, and shall not process any further indigence applications, until an appropriately experienced public defender with a caseload that falls under the cap becomes available. To do otherwise may constitute a violation of the Missouri Rules of Professional Conduct and would violate this Consent Judgment. The MSPD Director shall take whatever steps are legally authorized in order to prevent any public defender from exceeding the caseload cap articulated herein.
- l. In lieu of processing additional indigence applications when this standard has been reached and placing such defendants on a wait list for public defender services, the MSPD shall ensure that the relevant District Defender promptly notifies the circuit court that the caseload standard has been reached in order to promptly allow the court to: (1) appoint private counsel pursuant to *State ex rel. Wolff v. Ruddy*, 617 S.W.2d 64 (1981) and *Williamson v. Vardeman*, 674 F.2d 1211 (1982); (2) engage with the prosecutor regarding the elimination of incarceration as a possible sentence for the offense(s) charged, thus eliminating the constitutional right to an attorney pursuant to *Scott v. Illinois*, 440 U.S. 367, 373-74 (1979); (3) dismiss the case per the requirements set forth in *Ruddy* and *Williamson*; or (4) take any other actions that are consistent with the constitutions

of the United States and Missouri, and that do not violate the requirements and limitations of this Consent Judgment.

- m. For case types that do not have a number of hours assigned by RubinBrown, the Parties shall agree on an hourly number that is consistent with other RubinBrown workload averages. For example, because Class E felonies were added by the legislature after the creation of the RubinBrown standards, within 30 days of the Effective Date of this Consent Judgment, the Parties shall agree on a proposed standard for Class E felonies that is consistent with other RubinBrown workload averages. Thereafter, the Parties shall reach such agreement within 30 days of identifying a case type that was not included in the RubinBrown study.<sup>8</sup>
- n. Because capital cases are also not included among the RubinBrown case types, the MSPD shall ensure that public defenders comply with the American Bar Association's *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* (Revised Edition 2003)(published in 31 *Hofstra L. Rev.* 913 (2003)), and the American Bar Association's *Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases* (2008)(published in 36 *Hofstra L. Rev.* 677 (2008)).
- o. The MSPD may, from time to time, permit a public defender to deviate below the MSPD caseload standard if, in MSPD's discretion, such deviation is necessary to provide effective representation to a public defender's existing clients or to otherwise comply with the Rules of Professional Conduct. Reasons for downward deviation may include, but are not limited to, the complexity of the

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<sup>8</sup> Other potential case types not referenced in the RubinBrown study may include, but are not limited to, writs of prohibition and mandamus, declaratory judgment actions, and writs of habeas corpus.



assigned cases; court and case scheduling; the availability of support staff; a public defender's tenure, experience, and ability; a public defender's non-representational duties; health, vacancy, and leave situations; as well as the relative unpredictability of non-controllable case tasks such as in-court advocacy, travel, training, and administrative time.

- p. The MSPD may, from time to time, permit a public defender to deviate above the MSPD caseload standard if, in MSPD's judgment, such deviation would not jeopardize that attorney's ability to effectively represent his or her existing clients or otherwise violate his or her professional obligations under the Rules of Professional Conduct. Reasons for upward deviation may include, but are not limited to, the complexity of the assigned cases; court and case scheduling; the availability of support staff; and a public defender's tenure, experience, and ability. For example, an appellate public defender who has completed all currently assigned legal briefs may receive an additional case assignment. Any regular or routine deviation(s), along with the justification for such deviation, should be included in any subsequent report to the Monitor.
- q. Because MSPD attorney-managers have additional supervisory responsibilities under the Rules of Professional Conduct,<sup>9</sup> including oversight of anywhere from two to 34 subordinate attorneys, depending on the district, such attorney-managers should have a caseload that is in proportion to their management responsibilities, as determined by MSPD, but in no event shall such caseload

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<sup>9</sup> Missouri Supreme Court Rule 4-5.1.

exceed an assigned caseload of more than 130 hours' (.75 of 173.3) worth of case work in a given calendar month period.

- r. Unless otherwise provided by law, when one or more public defenders in a district office become available to accept a new case or cases based on the requirements set forth herein, the MSPD shall ensure that defendants who are detained pre-trial are prioritized for representation.
- s. A public defender may be required to move to withdraw from one or more cases in order to comply with the requirements set forth herein and in order to ensure effective assistance of counsel and compliance with ethical obligations under the Rules of Professional Conduct. If withdrawal is appropriate, the MSPD shall ensure that public defenders identify the appropriate case or cases that will have the least impact on the client or clients.

#### **XIX. REPORTING**

- a. On or before January 1, April 1, July 1, and October 1 of each year, the MSPD shall provide the Monitor and Plaintiffs' counsel with data and accompanying documentation to demonstrate any compliance or non-compliance with the Consent Judgment. Because it will require some amount of time to come into substantial compliance with this Consent Judgment, the initial round of data and accompanying documentation shall be due on or before January 1, 2020, which may be extended only upon mutual agreement of the parties, and a progress report shall be submitted to the Monitor on or before October 15, 2019.
- b. The Monitor may request and consider additional non-privileged information in order to assess MSPD's compliance with the terms of this Consent Judgment.

- c. On a bi-annual basis, beginning six months from the Effective Date, the Monitor shall produce and submit to the Parties a detailed report outlining the extent to which the MSPD is in compliance with the terms of this Consent Judgment.

## **XX. DISPUTE RESOLUTION**

- a. The United States District Court for the Western District of Missouri shall retain jurisdiction to enforce the terms of this Consent Judgment and the Parties' obligations thereunder.
- b. If Plaintiffs' counsel reasonably believes that the MSPD is not in substantial compliance with the terms of this Consent Judgment, Plaintiffs' counsel shall bring the issue(s) to the attention of the Monitor in order to conduct further investigation into the issue(s) raised.
- c. In the event that the Monitor determines that the MSPD is not in compliance with the terms of this Consent Judgment, s/he shall notify the Court and counsel for the Plaintiffs in writing, and may request a hearing to seek further guidance from the Court or recommend appropriate modifications to the Consent Judgment in light of MSPD's non-compliance.

## **XXI. GENERAL PROVISIONS**

- a. Modification
  - i. This Consent Judgment may not be modified without the written consent of the Parties and the approval of the Court. However, the Parties agree that nonmaterial modifications of this Consent Judgment can be made, with the written consent of the Parties, without approval of the Court.
- b. Termination

i. Defendants may seek termination of the Consent Judgment pursuant to Federal Rule of Civil Procedure 60(b). For purposes of Rule 60(b)(6), six consecutive bi-annual reports from the Monitor concluding the MSPD is in substantial compliance with the Consent Judgment may constitute a reason that justifies relief from the provisions articulated herein.

c. Third-party Beneficiaries

i. All indigent persons who are now, or who will be, under formal charge before a state court in Missouri for allegedly having committed any offense the penalty for which includes the possibility of confinement, incarceration, imprisonment, or detention (regardless of whether actually imposed), and who are represented by MSPD, or should be represented by MSPD, pursuant to this Consent Judgment, but who have not received counsel at a critical stage or who have been placed on a waiting list for representation by MSPD, shall be hereby deemed third-party beneficiaries to this Consent Judgment.

ii. This Consent Judgment may be enforced by any of the named Plaintiffs in the case, or by any third-party beneficiary.

d. Expiration of Consent Judgment.

i. This Consent Judgment shall expire seven years after the Effective Date.

e. Entire Judgment

i. This Consent Judgment contains all the terms and conditions agreed upon by the Parties with regard to the settlement contemplated herein, and

supersedes all prior agreements, representations, statements, negotiations, and undertakings (whether oral or written) with regard to settlement.

f. Interpretation

- i. The Parties acknowledge that each Party has participated in the drafting and preparation of this Consent Judgment; consequently, any ambiguity shall not be construed for or against either Party.

g. Time Periods

- i. If any of the dates or periods of time described in this Judgment fall or end on a public holiday or on a weekend, the date or period of time shall be extended to the next business day.

h. No Waiver for Failure to Enforce

- i. Failure by any Party to enforce this entire Consent Judgment or any provision thereof with respect to any deadline or other provision herein shall not be construed as a waiver of its right to enforce deadlines or provisions of this Consent Judgment.

i. Unforeseen Delay

- i. If an unforeseen circumstance occurs that causes the MSPD to fail to timely fulfill any of the reporting requirements articulated in Section XIX(a) of this Consent Judgment, the MSPD shall notify the Monitor and Plaintiffs' counsel in writing within 20 days after the MSPD becomes aware of the unforeseen circumstance and its impact on the MSPD's ability to perform and the measures taken to prevent or minimize the failure. The MSPD shall take all reasonable measures to avoid or minimize any such

failure. Nothing in this paragraph shall alter any of the MSPD's obligations under this Consent Judgment or Plaintiffs' remedies for a breach of this Consent Judgment.

j. Binding Effect on Successors

- i. The terms and conditions of this Consent Judgment, and the commitments and obligations of the Parties, shall inure to the benefit of, and be binding upon, the successors and assigns of each party.

k. Governing Law

- i. This Consent Judgment shall be governed by and construed in accordance with the laws of the State of Missouri, without regard to the conflicts of law provisions thereof.

l. Signatories

- i. The undersigned representative of each party to this Consent Judgment certifies that each is authorized to enter into the terms and conditions of this Consent Judgment and to execute and bind legally such Party to this document.

**XXII. ATTORNEYS' FEES AND COSTS**

- a. Any motion for attorneys' fees and costs or bill of costs shall be filed by no later than 35 days after entry of this Consent Judgment.

It is so agreed.

**Counsel for Plaintiffs**

/s/ Jason D. Williamson

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May 13, 2019

Date

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May 13, 2019

Date

**Counsel for Defendants:**

/s/ J. Gregory Mermelstein

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May 13, 2019

Date

Approved and ORDERED by the Court.

The Honorable Nanette K. Laughrey  
United States District Judge

Date